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No. 95-1694

In the Supreme Court of the United States

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN DOE, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a state instrumentality that would otherwise be immune from suit under the Eleventh Amendment as an arm of the State loses its Eleventh Amendment immunity because the federal government may be contractually obligated to bear the cost of an adverse judgment against it.

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INTEREST OF THE UNITED STATES

This is a suit against a state university that operates a federally-owned nuclear research laboratory pursuant to a contract with the United States Department of Energy. The decision of the court of appeals withholds Eleventh Amendment immunity from the university on the basis of an indemnity provision in the contract. The United States has a substantial interest in the effect of its contractual arrangements on the amenability of States and their instrumentalities to suit in the federal courts.

STATEMENT

1. Since the establishment of the Manhattan Project during the Second World War, the federal government has owned facilities for nuclear weapons production and nuclear research and development. In 1946, Congress placed ownership and control of the government's nuclear facilities in the Atomic Energy Commission. See Atomic Energy Act of 1946, ch. 724, §§ 4(c), 9(a), 60 Stat. 759, 765. In 1975, responsibility for the government's nuclear facilities was transferred to the Energy Research and Development Administration and, in 1977, to the Department of Energy (DOE), which remains responsible for them today. See Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565. Several laboratories and other facilities owned by DOE currently carry out nuclear research, development, and weapons activities. H.R. Rep. No. 499, 103d Cong., 2d Sess. 340-341 (1994) (1994 House Report).

Although owned by the federal government, these facilities are operated by private and public contractors, which are responsible for the day-to-day management of the facilities and employment of the personnel who work at them. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 176, 180-181 & n.2 (1988); *United States* v. *New Mexico*, 455 U.S. 720, 722-723 n.1 (1982); *United States* v. *Boyd*, 378 U.S. 39, 47 (1964); United States General Accounting Office, *High-Risk Series: Department of Energy Contract Management* 11-12 (1992) (GAO Report).

Contractors operate DOE's nuclear facilities pursuant to management and operating (M&O) contracts.

See *Boyd*, 378 U.S. at 47; O.S. Hiestand, Jr. & Mark J. Florsheim, *The AEC Management Contract Concept*, 29 Fed. Bar J. 67, 68-74 (1969); 48 C.F.R. Pt. 970. M&O contracts "are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities." *New Mexico*, 455 U.S. at 723; Hiestand & Florsheim, 29 Fed. Bar J. at 68. M&O contracts give contractors considerable discretion in the operation of DOE's facilities: "While subject to the general direction of the [federal] Government, the contractors are vested with substantial autonomy in their operations." *New Mexico*, 455 U.S. at 723; *Boyd*, 378 U.S. at 42, 48; H.R. Rep. No. 1006, 101st Cong., 2d Sess. 206 (1991) (1991 House Report) ("In deference to the contractors' expertise, the DOE and its predecessor agencies have consistently followed a 'least interference' approach toward the operation of their nuclear facilities."); GAO Report at 11. Thus, while DOE nuclear facilities are immune from direct state regulation in the absence of Congressional authorization, see *Goodyear Atomic Corp.*, 486 U.S. at 180-181, the contractors who operate them "cannot be termed 'constituent parts' of the Federal Government," and do not enjoy federal sovereign immunity. *New Mexico*, 455 U.S. at 740; *Boyd*, 378 U.S. at 47.

The federal government has assumed financial responsibility for virtually all of the costs incurred by contractors in connection with their operation of DOE's nuclear facilities. See GAO Report at 25; H.R. Rep. No. 1095, 102d Cong., 2d Sess. 169 (1992) (1992 House Report); 1991 House Report at 206. M&O contracts provide that DOE will pay a contractor's "allowable costs" and, with limited specified exceptions, all costs incurred by the contractor in connec-

tion with its work have traditionally been deemed allowable. See 48 C.F.R. 970.5204-13; Hiestand & Florsheim, 29 Fed. Bar J. at 75. Contractor costs generally are paid through an "advanced funding" mechanism (see 48 C.F.R. Subpt. 970.32), that "allows contractors to pay creditors and employees with drafts drawn on a special bank account in which United States treasury funds are deposited." *New Mexico*, 455 U.S. at 725-726. The contractor pays its expenses by drawing on the account, while the federal government retains ownership of the account balance. *Id.* at 726.

As a general matter, the costs of legal judgments against contractors arising out of the operation of DOE facilities are treated as allowable costs under M&O contracts. See 48 C.F.R. 970.5204-13(d)(4) and (5), 970.5204-31; Hiestand & Florsheim, 29 Fed. Bar J. at 98; 1991 House Report at 206-207. The government's contractual obligation to pay for judgments against DOE contractors historically has been subject only to "very narrow, and infrequently invoked, conditions" (1991 House Report at 207). DOE is, however, in the process of modifying its M&O contracts in order to place greater responsibility on contractors for costs associated with legal liabilities to third parties. See 61 Fed. Reg. 32,588 (1996) (discussing proposed amendments to Department of Energy Acquisition Regulation to revise M&O contracts and to reflect "performance-based management contracting" principles).[1]

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[1] M&O contracts may also contain special indemnification provisions relating to liabilities arising out of nuclear incidents. See 48 C.F.R. Subpt. 950.70, 952.250-70. Under Section 170 of the Atomic Energy Act of 1954, as amended, Pub. L. No. 100-408, 102 Stat. 1066, commonly referred to as the Price Anderson Act, DOE is required to indemnify its contractors against liabilities arising out of such incidents without regard to a contractor's fault. See 42 U.S.C. 2210(d). The indemnification provisions of Section 170(d) are incorporated into the terms of all M&O agreements in which contractors are at risk of liability for a nuclear incident. See also note 12, *infra*.

2. Lawrence Livermore National Laboratory (Laboratory) is one of DOE's nuclear research and development laboratories. Since its creation in 1952, the Laboratory has been operated by petitioner Regents of the University of California (University) pursuant to a regularly renewed M&O contract.[2] The University is established by the California Constitution as a public corporation and entitled to support "[f]rom all state revenues." Cal. Const. Art. IX, § 9(a); *id.* Art. XVI, § 8(a). Under California law, the University is characterized as "a constitutional department * * * of the state government" (*Hamilton* v. *Regents of the Univ. of California*, 293 U.S. 245, 257 (1934)), "a constitutionally created arm of the state" (*Regents of the Univ. of California* v. *City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Ct. App. 1978)), and "a statewide administrative agency" (*Ishimatsu* v. *Regents of the Univ. of California*, 72 Cal. Rptr. 756, 763 (Ct. App. 1968)).

The current contract between DOE and the University for the operation of the Laboratory states that, "WHEREAS, the University * * *, as a nonprofit organization, has managed the Lawrence Livermore National Laboratory * * * as a public

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[2] The University also has managed and operated two other DOE nuclear facilities under M&O contracts, the Los Alamos National Laboratory in New Mexico, and the Lawrence Berkeley National Laboratory in California.

service to the nation, for no loss or gain, * * * the federal government provides a general indemnification of the University against liability." See Contract Between the United States of America and the Regents of the University of California (Docket Entry 59) [hereinafter Contract, Art. I]. Under the contract, DOE is required to "indemnify and hold the University harmless against any delay, failure, loss or damage, judgment, or liability * * * arising out of or connected with the [contract] work" unless "any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract." *Id.* Art. XVII, Cl. 4(b).[3] The contract further provides that "[t]he obligations of DOE under this [indemnity] clause * * * shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress." *Id.* Cl. 4(d). The University's allowable costs under the contract are paid through the advanced funding mechanism generally used in M&O contracts. *Id.* Art. VII, Cl. 3. In addition, the contract provides that "[t]he Government shall pay directly and

[3] Allowable costs and unallowable costs are enumerated elsewhere in the contract. See Contract, Art. VII, Cl. 1(d) and (e). Under these provisions, judgments and settlements, as well as litigation defense costs, generally are treated as allowable costs under the contract. *Id.* Cl. 1(d)(4); see also *id.* Art. XVII, Cl.1.

discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University." *Id.* Art. XVII, Cl. 4(c). DOE has not determined whether or not it is contractually obligated to pay the costs of any judgment that may be entered against the University in this case.

3. This case arises out of an employment dispute between the University and respondent John Doe. Doe, a mathematical physicist and a citizen of New York, alleges that in 1991 the Laboratory improperly withdrew an offer of employment because the Laboratory determined that Doe would not be able to obtain a required security clearance from DOE.

Doe filed suit in the District Court for the Northern District of California in 1992. He named as defendants the University; the University's president; the Laboratory; petitioner John Nuckolls (the director of the Laboratory); and several federal defendants, including DOE and the Secretary of Energy. Doe's claims against the federal defendants were dismissed with prejudice pursuant to a stipulation between the parties, and the claims against the president of the University also were dismissed by the district court. See Pet. App. 3a n.1, 4a. The Laboratory remains a named defendant but, as Doe acknowledged below, the Laboratory is a physical installation that is not subject to suit as a separate legal entity. As a result, the only relevant remaining claims are those against the University and Nuckolls.

Doe asserted claims against the University and Nuckolls under California common law and 42 U.S.C. 1983. Doe's common law claim asserted that the University committed a breach of contract by failing to honor the Laboratory's initial offer of employment.

First Amended Compl. ¶¶ 13-15.[4] Doe's Section 1983 claim asserted that the University and Nuckolls violated Doe's rights under the Due Process Clause because Doe's eligibility for a security clearance was not determined by DOE pursuant to its regulations. *Id.* ¶¶ 16-19. Doe asked the district court to order the University and Nuckolls to employ him in accordance with his employment contract, and to award damages against the University and Nuckolls for back pay and lost benefits. *Id.* at p. 6.

The University and Nuckolls moved to dismiss Doe's Section 1983 claim. Among other things, they asserted that they are immune from suit under the Eleventh Amendment as an "arm of the State," and hence are not "persons" within the meaning of Section 1983 under *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989). The district court granted the motion to dismiss the Section 1983 claim against the University, agreeing that the University is an arm of the State for Eleventh Amendment purposes and therefore is not a proper Section 1983 defendant under *Will*. Pet. App. 28a. For the same reason, the district court dismissed the Section 1983 claim against Nuckolls in his official capacity. Pet. App. 29a (citing *Will*, 491 U.S. at 70-71). The court declined to dismiss the Section 1983 claim against Nuckolls in his personal capacity. *Ibid.*

Doe subsequently filed a second amended complaint, which renewed his breach of contract and Section 1983 claims against the University and Nuckolls, and

[4] Doe initially included Nuckolls in the breach of contract claim, but that claim against Nuckolls was dismissed because Nuckolls was not a party to the alleged contract. See Pet. App. 27a n.5.

added class action allegations and sought prospective injunctive relief on behalf of the class. Second Amended Compl. ¶¶ 14-16 & p. 7. The University and Nuckolls again moved to dismiss the Section 1983 claims, and the University moved to dismiss the contract claim on the basis of the Eleventh Amendment.

The district court dismissed the Section 1983 claims against the University and Nuckolls in his official capacity on the basis of the court's earlier dismissal ruling. Pet. App. 22a-24a.[5] The court also dismissed the breach of contract claim against the University, relying on the court's earlier ruling that the University is an "arm of the State" for Eleventh Amendment purposes. *Id.* at 24a. The district court then granted a motion by Doe for entry of a separate judgment regarding the dismissed claims under Fed. R. Civ. P. 54(b), and Doe filed a timely appeal. Pet. App. 5a, 19a.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-11a. The majority noted that, although the Eleventh Amendment bars suits in federal courts in which a "state or 'arm of the state' is a defendant," an "entity could be organized or managed in such a way that it does not qualify as an arm of state entitled to sovereign immunity." *Id.* at 6a (quotation omitted). The court then applied "a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state," and observed that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the

[5] The district court did not dismiss the claims on behalf of the putative class against Nuckolls in his official capacity. Pet. App. 24a n.2; see *Will*, 491 U.S. at 71 n.10.

state." *Id.* at 6a-7a. The court concluded that this factor "weighs against granting the University Eleventh Amendment immunity from suit in federal court" because the University's "[c]ontract makes clear that [DOE] and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." Pet. App. 7a.[6] The court of appeals held that the district court erred in relying on previous Ninth Circuit precedent holding that the University was an arm of the State, because the five-factor test yields a different conclusion when applied to "this unique situation in which [DOE], and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory." *Id.* at 8a-9a. The court concluded that because "the University, in this particular instance, is not functioning as an arm of the state" and "Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a 'person' who is fully liable under § 1983," Doe could bring his breach of contract and Section 1983 claims in federal court. *Id.* at 10a-11a. Because it held that the University is not an arm of

[6] The court of appeals relied on the current contract between the University and DOE. Pet. App. 3a. Technically, DOE's obligations in this case are not governed by the current contract, because its provisions do not apply to costs arising from events occurring prior to the date of the contract's execution on November 20, 1992. See Contract, Art. XVIII, Cl. 3(b). The allowability of pre-1992 costs, such as those at issue in this case, is governed instead by the provisions of the prior M&O contract which was executed in 1987. *Ibid.* The 1987 contract is not a part of the record of this case. For present purposes, however, there appear to be no material differences between the 1987 contract and the current contract.

the State, the court found it unnecessary to determine "whether the University has waived or Congress has abrogated the University's [Eleventh Amendment] immunity." *Id.* at 10a.

Judge Canby dissented. Pet. App. 11a-14a. He saw the Eleventh Amendment analysis as straightforward: "If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived." *Id.* at 12a. In his view, the critical Eleventh Amendment question "is not who pays in the end," but rather "who is legally obligated to pay the judgment that is being sought." *Id.* at 14a. Here, it is undisputed that a judgment against the University is "a legal obligation of the State of California," and the fact that the University might have a contractual right to shift the cost of the judgment to the federal government "does not affect [the State's] primary liability for the judgment." *Id.* at 13a. Judge Canby also noted that, although "there is a relatively clear indemnity agreement," the United States nonetheless might have defenses to indemnity in this or other cases. He asked: "Must we assess the State's likelihood of success [in seeking indemnity] in order to decide the Eleventh Amendment question?" *Id.* at 14a.

SUMMARY OF ARGUMENT

Until the decision below, the University consistently had been considered an arm of the State immune from suit under the Eleventh Amendment. In this case, the court of appeals held that the University lost that status because its contract with the federal government shields the state's fisc from the impacts of an adverse judgment. That conclusion can-

not be reconciled with this Court's Eleventh Amendment jurisprudence.

A State's dignitary interest in immunity from suit requires that the Eleventh Amendment inquiry turn on whether a state entity is the party against whom judgment is sought. When judgment is sought against a state entity it is irrelevant whether the State ultimately has a contractual right of indemnity or reimbursement from a third party. In this case, there is no question that an adverse judgment would be a legal liability of the University, a state entity. The contractual provisions that shift the economic impact of the University's legal liability to the federal government do not change the fact that the State has been sued.

Viewed purely in practical terms, the court of appeals' analysis is also incorrect. The decision below would make Eleventh Amendment immunity dependent on contractual issues that a district court could not readily resolve. If the Eleventh Amendment is to function properly, a court must be able to determine its applicability at the outset of a case. Under the court of appeals' ruling, however, applicability of the Eleventh Amendment turns on a case-specific determination whether the state entity has legal recourse against a third party to satisfy a judgment. This factual question generally will be unresolved prior to a full presentation of the evidence, and the availability of such recourse ultimately will depend in part upon the actions of a party that is not before the court.

ARGUMENT

A STATE INSTRUMENTALITY'S CONTRACTUAL RIGHT TO INDEMNIFICATION FROM THE FEDERAL GOVERNMENT DOES NOT ALTER ITS STATUS AS AN ARM OF THE STATE UNDER THE ELEVENTH AMENDMENT

1. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." By virtue of the Eleventh Amendment, a State may not be sued by individuals in the federal courts unless the State has waived its immunity or Congress has abrogated that immunity pursuant to a valid grant of constitutional authority. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1122 (1996); *Will*, 491 U.S. at 66; *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985).[7]

Under the "arm of the State" doctrine, the immunity conferred on the States by the Eleventh Amendment extends to agencies and other instrumentalities of the States. See, *e.g.*, *Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (*PRASA*); *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978) (per curiam); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 400-401 (1979); *Mt. Healthy City School Dist. Bd. of Educ.*

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[7] The Eleventh Amendment does not restrict the jurisdiction of the federal courts over suits by the United States. See, *e.g.*, *Seminole Tribe*, 116 S. Ct. at 1131 n.14 ("the Federal Government can bring suit in federal court against a State"); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782, 783 (1991); *United States* v. *Texas*, 143 U.S. 621, 644-645 (1892).

v. *Doyle*, 429 U.S. 274, 280 (1977); *Ford Motor Co.* v. *Department of the Treasury of Indiana*, 323 U.S. 459 (1945). In this case, petitioners seek dismissal of the claims against them on the ground that the University is an arm of the State of California for Eleventh Amendment purposes and hence is immune from suit in the federal courts.

This Court has never decided whether any particular state university is an arm of its State for Eleventh Amendment purposes.[8] However, the Court has decided that an order issued by the Regents of the University of California reflects an exercise of "state law-making power" sufficient to render that order a "statute of [a] state." *Hamilton*, 293 U.S. at 258. Moreover, the lower federal courts have held repeatedly that state universities are entitled to Eleventh Amendment immunity as arms of the State.[9]

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[8] *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) was a Section 1983 suit against the University of Florida. The Court declined to decide whether the university was immune from suit under the Eleventh Amendment because the issue had not been directly raised. 457 U.S. at 515-516 n.19. In separate opinions, three members of the Court addressed the Eleventh Amendment issue. Chief Justice Burger and Justice Powell concluded that the university was protected by the Eleventh Amendment, while Justice White concluded that the university's Eleventh Amendment immunity had been waived by Florida. See *id.* at 519 n.* (White, J., concurring in part and concurring in the judgment); *id.* at 529-531 (Powell, J.,).

[9] See, *e.g.*, *Hutsell* v. *Sayre*, 5 F.3d 996 (6th Cir. 1993), cert. denied, 114 S.Ct. 1071 (1994); *Lassiter* v. *Alabama A & M Univ.*, 3 F.3d 1482 (1993), aff'd in part, rev'd in part on other grounds on reh'g en banc, 28 F.2d 1146 (11th Cir. 1994); *Kaimowitz* v. *Board of Trustees*, 951 F.2d 765 (7th Cir. 1991); *Dube* v. *State Univ. of New York*, 900 F.2d 587 (2d Cir. 1990), cert. denied, 501 U.S. 1211 (1991); *Richard Anderson*

Until this case, the Ninth Circuit consistently had held that the University of California constitutes an arm of the State of California for Eleventh Amendment purposes. See, *e.g.*, *Thompson* v. *City of Los Angeles*, 885 F.2d 1439, 1443 (1989); *BV Engineering* v. *Univ. of California*, 858 F.2d 1394, 1395 (1988), cert. denied, 489 U.S. 1090 (1989); *Jackson* v. *Hayakawa*, 682 F.2d 1344, 1350 (1982); see also *Mascheroni* v. *Board of Regents of Univ. of California*, 28 F.3d 1554, 1559 (10th Cir. 1994) (same); *Vaughn* v. *Regents of Univ. of California*, 504 F. Supp. 1349, 1352-1354 (E.D. Cal. 1981) (same). The court of appeals here departed from those precedents primarily because of its conclusion that DOE has an obligation under the M&O contract to bear the cost of any judgments against the University arising out of the University's operation of the Laboratory.[10] The court's reasoning and holding are incorrect.

a. The decision below assumes that Eleventh Amendment concerns are implicated only by the imposition of financial liability on state treasuries. That assumption is directly contrary to this Court's

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Photography v. *Brown*, 852 F.2d 114 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); *Rutledge* v. *Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), aff'd, 460 U.S. 719 (1983); *Jagmandan* v. *Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977); *Prebble* v. *Broadrick*, 535 F.2d 605 (10th Cir. 1976).

[10] The court of appeals posed the question before it as whether a state entity is no longer an arm of the State when a judgment against the entity is paid from sources other than the State's treasury. Under the reasoning of the decision below, however, the State of California presumably would not be immune if DOE had contracted directly with it to manage the Laboratory, because the State's revenues would not be tapped to pay the judgment.

Eleventh Amendment jurisprudence. In *Seminole Tribe*, the Court held that: "The Eleventh Amendment does *not* exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury'." 116 S. Ct. at 1124 (emphasis added). The notion that the Eleventh Amendment serves "merely [as] a defense to liability" "misunderstands the role of the Amendment in our system of federalism: 'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *PRASA*, 506 U.S. at 145, 146 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); *Seminole Tribe*, 116 S. Ct. at 1124. Accordingly, in *PRASA*, the Court held that states are entitled to appeal immediately from denials of motions to dismiss on Eleventh Amendment grounds in order to "ensur[e] that the States' dignitary interests [under the Eleventh Amendment] can be fully vindicated." 506 U.S. at 146.

Because the Eleventh Amendment is designed primarily to vindicate the States' dignitary interests in the federal system, "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 116 S. Ct. at 1124; *PRASA*, 506 U.S. at 146. As this Court observed in *Cory* v. *White*, 457 U.S. 85 (1982), the Eleventh Amendment by its terms applies to suits seeking injunctive relief, as well as to suits seeking damages. 457 U.S. at 91. The Court noted that "[i]t would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to

enjoin the State itself simply because no money judgment is sought." *Id.* at 90.[11]

These principles apply with equal force when a litigant sues an arm of the State. See *PRASA*, 506 U.S. at 146 ("suits against the States *and their agencies* * * * are barred regardless of the relief sought") (emphasis added). For example, in *Alabama* v. *Pugh*, *supra*, prisoners sued the State of Alabama, the Alabama Board of Corrections, and several state officers for injunctive relief relating to the prisoners' conditions of confinement. The Court held that the Eleventh Amendment provided immunity from suit, not only to Alabama, but to the Board of Corrections as well. 438 U.S. at 781-782. The fact that the prisoners were not seeking damages from the Board of Corrections, and hence that the judgment would not subject the state treasury to retrospective financial liability, did not affect the Board's immunity from suit. Accord, *Atascadero State Hospital*, 473 U.S. at 237-247 (state hospital and state Department of Mental Health are immune from suit for injunctive relief as well as damages).

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[11] In contrast, when a litigant sues an individual state officer in his or her official capacity, the relief does affect the Eleventh Amendment analysis. While a suit against a state official seeking retrospective monetary relief that "must inevitably come from the general revenues of the State" is barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), under *Ex parte Young*, 209 U.S. 123 (1908), a suit against the official seeking prospective injunctive relief on the basis of federal law is not deemed a suit against the State for Eleventh Amendment purposes. See, *e.g.*, *PRASA*, 506 U.S. at 145. The *Ex parte Young* doctrine "has no application in suits against the States and their agencies." 506 at 146; *Blatchford*, 501 U.S. at 785 n.3.

The decision below cannot be reconciled with these Eleventh Amendment principles. The court of appeals did not repudiate its prior decisions holding that the University is ordinarily an arm of the State under the Eleventh Amendment. Instead, the court held that the University loses that status when, by virtue of a contractual indemnification provision, the United States will be liable to reimburse the University for any monetary judgment against it. Despite that provision, however, the University remains subject to suit and any judgment rendered in such a suit will be rendered against the University, which will be responsible for its satisfaction. In those circumstances, the indemnification provision does not change the University's status as an arm of the State for Eleventh Amendment purposes.[12]

[12] Congress has legislated on the assumption that state entities that are indemnified under contract with DOE do not automatically lose their governmental immunity. The Price Anderson Act, 42 U.S.C. 2210, requires DOE to enter into agreements of indemnification with contractors performing work involving risk of liability to third parties arising out of nuclear incidents. See also note 1, *supra*. The Act further authorizes DOE to incorporate into such indemnification agreements "provisions relating to the waiver of any issue or defense as to * * * governmental immunity." 42 U.S.C. 2210(d)(1)(B)(ii). The current contract between DOE and the University contains a "nuclear hazards indemnity" provision that requires the University to waive governmental immunity in cases arising out of nuclear incidents. Contract, Art. XVII, Cl. 2(e)(1). Had Congress understood that the federal indemnity would itself render States and their instrumentalities subject to suit in the federal courts, the provision authorizing DOE to require a State to waive its immunity in cases involving nuclear accidents would have been superfluous.

b. The financial responsibilities of a State's instrumentalities are not wholly irrelevant for Eleventh Amendment purposes. In determining whether particular entities are arms of States under the Eleventh Amendment, this Court has relied, *inter alia*, on the extent to which a State is legally responsible for the cost of judgments against the entity in question. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 403-406 (1994); *Lake Country Estates*, 440 U.S. at 402.[13]

What this Court's precedents contemplate, however, is an inquiry into the legal relationship between the State and its instrumentalities in order to determine whether the instrumentality is an arm of the State or a separate entity for Eleventh Amendment purposes. See, *e.g.*, *Hess*, 115 S. Ct. at 403-406. Here, it is undisputed that money judgments against the University are legal obligations of the State of California and ordinarily are satisfied out of state revenues. See Pet. App. 13a (Canby, J., dissenting); *Vaughn*, 504 F. Supp. 1349, 1353 ("any judgment obtained * * * against the Regents will have to be paid out of the *state* treasury or other sources of *state* funds"). If Doe obtains a judgment for damages against the University, the University will be legally responsible to Doe for that judgment. Although the cost of such a judgment ultimately may be borne by DOE pursuant to the terms of the M&O contract, the contractual arrangements between DOE and the

[13] *Hess* and *Lake Country Estates* involved claims of Eleventh Amendment immunity by multi-state entities created pursuant to the Compact Clause. In contrast to suits against an arm of an individual State, suits against Compact Clause entities are not considered to affect the dignitary interests of the participating States. *Hess*, 115 S. Ct. at 400-402.

University do not alter the University's legal obligation to Doe. Doe would be entitled to have the judgment paid by the University, and Doe could invoke the coercive powers of the district court against the University and its assets if payment were not forthcoming.[14] Doe could not enforce such a judgment against DOE, nor could he bring suit against DOE for any failure to provide the University with the funds required to pay the judgment. See Pet. App. 13a (Canby, J., dissenting) ("Doe, if he wins his case, must execute his judgment against the State, not the United States.").[15]

Because the University is legally liable for a judgment in this case, the fact that the cost of such a judgment ultimately may be borne by DOE is irrelevant for Eleventh Amendment purposes. As explained above, the Eleventh Amendment is concerned not only with protecting state treasuries from financial liability imposed by federal courts, but also with "'prevent[ing] the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *PRASA*, 506 U.S. at 146 (quoting

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[14] The same result follows with respect to Doe's Section 1983 claim against petitioner Nuckolls in his official capacity. See *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("a judgment against a public servant 'in his official capacity' imposes a liability on the entity that he represents"); accord *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985).

[15] The current contract provides that "[n]othing contained in this contract, or its amendments, shall be construed to grant, vest, or create any rights in any person not a party to this contract." Contract, Art. XVIII, Cl. 2. The same provision was included in the preceding contract (see note 6, *supra*).

Ayers, 123 U.S. at 505. The prospect that DOE will bear the cost of a judgment in Doe's favor does nothing to forestall the threat to California's "dignitary interests" (*ibid.*) that this suit otherwise poses.[16]

Even viewed in strictly economic terms, the conclusion of the court of appeals is incorrect. As an economic matter, the indemnification provision in the M&O contract effectively provides the University with insurance against the risk of loss from claims arising out of the operation of the Laboratory. The cost of this insurance is reflected in the financial terms of the contract. See Contract, Art. V, Cls. 3-4 (fee provisions). In the absence of a right to seek indemnification by DOE, the University (like any other contractor) would require a larger management fee in order to cover the anticipated costs of future claims by third parties. See 61 Fed. Reg. at 32,588 (noting that rulemaking to increase contractors' accountability for costs will be complemented by future rulemaking addressing DOE's fee policies). The management fee that the University receives under the existing contract thus reflects a deduction

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[16] For the same reasons, there is no constitutional significance to the fact that DOE is obligated to "pay directly" any final judgments against the University (Contract, Art. XVII, Cl. 4(c)). Whether the University first must pay a judgment from its own funds and then seek reimbursement from DOE or is entitled to require DOE directly to satisfy the judgment is a matter solely between the University and DOE and does not change the status of the judgment as a legal liability of the University owed to Doe. In any event, an obligation to "pay directly" or "reimburse" has few, if any, practical consequences, because the University pays all allowable costs relating to the operation of the Laboratory by drawing directly on federal funds through the contract's "advance funding" mechanism (see p. 4, *supra*).

for what is essentially a premium payment by the University for the liability coverage provided by DOE.

The Ninth Circuit recognized this point in an earlier decision. *Markowitz* v. *United States*, 650 F.2d 205 (1981) (per curiam). In *Markowitz*, the court of appeals affirmed the dismissal on Eleventh Amendment grounds of a suit for damages against the University of Arizona. The plaintiffs argued, *inter alia*, that the Eleventh Amendment was not implicated because "any damages recovered by them will come from insurance carriers rather than the State of Arizona." 650 F.2d at 205. The court of appeals rejected that argument, pointing out that "[t]he source of any damages to which the [plaintiffs] might become entitled would be state funds even if paid by an insurance carrier," since "[s]uch carriers would pay only because of premiums paid by the state." *Id.* at 206. Noting that Arizona would not lose its Eleventh Amendment immunity through self-insurance, the court of appeals concluded that "Eleventh Amendment immunity should not be made to turn on whether or not the state is a self-insurer." *Ibid.* Precisely the same reasoning applies in this case. See Pet. App. 13a (Canby, J., dissenting).

2. The court of appeals' decision creates serious practical problems for the resolution of Eleventh Amendment immunity claims by state instrumentalities like the University. Rarely, if ever, will an arm of a State enjoy an unqualified contractual right to indemnification from the federal government or a private insurer. In this case, for example, DOE is not obligated to "indemnify and hold the University harmless against a[] * * * judgment or liability * * * arising out of or connected with" the operation

of the Laboratory if the liability is due to bad faith or willful misconduct by petitioner Nuckolls or a corporate officer of the University (Contract, Art. XVII, Cl. 4(b))[17] or if appropriated funds are not available (*id.* Cl. 4(d); cf. *Hercules Inc.* v. *United States*, 116 S.Ct. 981, 987-988 (1996)). The scope of DOE's contractual responsibility for judgments against its contractors, moreover, is likely to become significantly less comprehensive (see p. 4, *supra*). Under proposed amendments to the Department of

[17] Doe suggests (Br. in Opp. 5) that this exception does not apply to the government's obligation to "pay directly and discharge completely" final judgments under Clause 4(c) of Article XVII. That is incorrect. Clause 4(c) of Article XVII cannot be read in isolation from the immediately preceding terms of Clause 4(b), which establish the general obligation to pay for the "costs and expense of litigation and claims" and specify the limits on that obligation. See also Contract, Art. VII, Cl. 1(e)(17)(ii) (allowable costs do not include "losses or expenses * * * [that] [r]esult from willful misconduct or lack of good faith on the part of some officer or officers of the Regents of the University of California or any person acting as Laboratory Director."). Doe also argues (Br. in Opp. 5) that this exception does not apply because he alleges no bad faith or wilful misconduct. However, DOE's interpretation of the contract is not bound by the facts as alleged in the complaint.

In the event that a judgment is entered against the University, the allowability of that cost will be determined in the first instance by the DOE contracting officer responsible for the administration of the contract (see Contract, Art. V, Cls. 9-10) and ultimately will be subject to resolution under the Contract's "Dispute Clause" and the Contract Disputes Act, 41 U.S.C. 601 *et seq.* See Contract, Art. XVI, Cl. 3. Exclusive jurisdiction to review the contracting officer's decision would be vested in the Energy Board of Contract Appeals, the United States Court of Federal Claims, and the United States Court of Appeals for the Federal Circuit. 41 U.S.C. 606-607, 609; 28 U.S.C. 1295(a)(3) and (10).

Energy Acquisition Regulation (DEAR), contractors will bear the burden of demonstrating that liabilities were not caused by the "failure to exercise prudent business judgment by the contractor's managerial personnel." 61 Fed. Reg. at 32,601 (proposed amendment to DEAR 970.5204-31).

If a defendant's Eleventh Amendment status in a particular case were to depend on whether the federal government is contractually liable to the defendant for the cost of an adverse judgment, the district court would be required to determine the government's liability under the contract before it could resolve the Eleventh Amendment jurisdictional issue. If the dignitary concerns of the Eleventh Amendment are to be meaningful, that determination would be required to take place at the outset of the case, for "the value to the States of their Eleventh Amendment immunity * * * is for the most part lost as litigation proceeds past motion practice." *PRASA*, 506 U.S. at 145. It would be exceedingly difficult, however, for the court to resolve, at the outset of each case, the potentially complex and fact-intensive issues of indemnification coverage. That would be particularly true when those issues turn on matters like "good faith" and "prudent business judgment" that cannot be determined without a thorough understanding of the factual context of the case and the nature of plaintiff's claims. These difficulties would be compounded by the absence from the litigation of one of the two contracting parties, because the federal government would not be present to address the meaning of the contract and its view of its contractual obligations.

Under such a regime, the parties and the district court would often face insurmountable problems in reaching a reliable resolution of the Eleventh Amendment inquiry. In addition, under elementary principles of *res judicata*, a determination that the federal government is contractually obligated to provide indemnification would not be binding on the United States, which would not be a party to the suit in which that determination was made. In the event of an adverse judgment, the government would therefore be free to withhold payment if it concluded, contrary to the views of the district court, that payment was not required by the contract. As a result, a State might find itself compelled by a federal court to pay damages, yet simultaneously be unable to shift the cost of the judgment to the federal government—a result that would appear to be constitutionally impermissible under any view of the Eleventh Amendment.

In sum, the decision below is both doctrinally and practically misconceived. Whether a state entity constitutes an arm of the State for Eleventh Amendment purposes should not depend on an inquiry into whether the entity has made contractual arrangements for the federal government to pay the cost of an adverse judgment. If the relationship between the instrumentality and the State otherwise supports Eleventh Amendment immunity, the inquiry into the instrumentality's Eleventh Amendment status should be at an end.

3. In particular cases, questions regarding waiver and Congressional abrogation of immunity may remain to be resolved even after a court has determined that a suit is against a State or an arm of a State. This case does not present the Court with those issues. See generally *Atascadero State Hospital*, 473 U.S. at 241-247; *Florida Dep't of Health & Rehab. Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147,

150 (1981) (per curiam); *Edelman*, 415 U.S. at 673-674; *Parden* v. *Terminal Ry.*, 377 U.S. 184, 186 (1966). Because the court of appeals held that the University is not an arm of the State for Eleventh Amendment purposes, the court found it unnecessary to decide whether the University had waived its immunity from suit (Pet. App. 10a), and the issue of waiver is not presented by the petition for writ of certiorari.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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